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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

J. GORDON BINGHAM, ET AL.;

AND

FIRST CENTRAL CREDIT UNION,
J. GORDON BINGHAM, ET AL.,

PETITIONERS,

V.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-5401/5402

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

J. GORDON BINGHAM, et al. (90-5401); and FIRST CENTRAL CREDIT UNION, J. GORDON BINGHAM, et al. (90-5402),
Plaintiffs-Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Tennessee

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Decided and Filed March 6, 1991

Before: MILBURN and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

MILBURN, Circuit Judge. Plaintiffs-appellants ("petitioners") in these consolidated cases appeal the dismissal of their petitions to show cause challenging the issuance of a temporary cease and desist order and the imposition of a conservatorship by the National Credit Union Administration Board. For the reasons that follow, we affirm.

I.

First Central Credit Union of Memphis, Tennessee (the "credit union") was chartered by the State of Tennessee and insured under the National Credit Union Share Insurance Fund, administered by the National Credit Union Administration ("NCUA"). The NCUA oversees credit unions in a similar manner as the FSLIC and the FHLBB oversee savings and loan associations.

In April 1984, the NCUA was contacted by the State of Tennessee to conduct a joint insurance review of the credit union. The insurance review was conducted by James Richardson, principal examiner for the NCUA in Memphis, Tennessee, and it revealed that the credit union was technically insolvent because the share ratio was approximately 99.5%, indicating that the shares were worth less than a dollar for a dollar.

In February 1989, Richardson conducted another insurance review of the credit union. This review revealed that the credit union was operating at a net loss of approximately $50,000 for the first two months of 1989. The credit union's loss was caused in part by delinquent loans and collection problems. Richardson testified that the NCUA's main concern was the future profitability of the credit union. Specifically, Richardson was concerned that the operating expenses of the credit union would increase due to four contracts it had entered into in January 1989 with J. Gordon and Brenda Bingham and companies owned by the Binghams. Bingham was the president of the credit union and the treasurer of the board of directors, and his wife was the vice-president of the credit union.

The four contracts were for management of the credit union, data processing services, insurance marketing, and a lease of the credit union building. The management contract paid the Binghams $48,000 per year for seven years. The data processing contract gave First Central Data Services, a company owned by the Binghams, the

right to provide data processing services to the credit union for seven years for a fee of approximately $13,000 per month. The insurance marketing agreement gave Employee Insurance Consultants, another company owned by the Binghams, the sole right to market insurance to credit union members and to provide payroll deductions through the credit union for insurance premiums over a seven-year period. The Binghams owned the building in which the credit union was located, and under the lease agreement the Binghams received $6,000 per month from the credit union to rent 60% of the building space. J. Gordon Bingham purchased the building in 1986 for $175,000, and under the lease he received $72,000 per year for fifteen years.

By June 1989 the credit union's operating expense to gross income ratio was 75.5%, compared to a peer group average of 34.9%. Also, by June of 1989 the credit union's losses on loans were six times that of its peer group. In July 1989, a Letter of Understanding and Agreement was entered into by the credit union, the State of Tennessee and the NCUA. James Richardson testified that the purpose of the agreement was to cause the credit union's board of directors to take the actions necessary to correct deficiencies in the operation of the credit union.

At a meeting in August 1989, the credit union's board of directors presented a proposed budget to the NCUA showing a loss of $99,000 over the next twelve months. The NCUA found this budget to be unacceptable because it indicated that the credit union would be insolvent within one year. The NCUA gave the credit union officials thirty days to present a revised budget showing that the credit union could become profitable. The credit union officials prepared a revised budget, and James Richardson testified that he reviewed the budget and determined that it was unrealistic because it was based on projections not supported by the facts. Richardson testified that the credit union projected income increasing at 1% per month with loans increasing at the same rate, but the credit union's history over the past several months revealed that loans

were decreasing at a rate of 18 to 20% per month. The budget also projected an increase in shares of 16 or 17% per annum, but the credit union's growth rate for the past three to four years had been 5 to 6%.

On October 31, 1989, the credit union submitted a statement of financial condition to the NCUA which revealed that the credit union had lost $273,563.23 from January through October 1989. Based upon these losses and the credit union's inability to submit a realistic budget, Richardson recommended that the NCUA place the credit union into conservatorship to conserve its assets. Ben Mauldin, NCUA's region III Director of Special Actions, concurred with Richardson's recommendation based on the rapidly deteriorating financial condition of the credit union. Mauldin testified that the credit union's capital had declined rapidly over the preceding ten months, and the credit union was operating at a substantial loss

On December 14, 1989, the NCUA Board moved to place the credit union into conservatorship. On December 15, 1989, NCUA officials served an order of conservatorship and a consolidated notice of charges and hearing and temporary cease and desist order on J. Gordon Bingham at the credit union. The order of conservatorship notified the credit union's officials and board of directors that the NCUA was appointing itself conservator of the credit union pursuant to 12 U.S.C. § 1786(h)(1) in order to conserve the assets of the credit union, to protect the share insurance fund, and to protect the interests of the credit union members. The order of conservatorship identified excessive loan losses, profitability, capital erosion, unsafe and unsound contracts, and failure to comply with the letter of understanding and agreement as problems at the credit union which necessitated imposing the conservatorship.

The temporary cease and desist order directed J. Gordon Bingham, Brenda Bingham, and their companies, First Central Data Services, First Central Financial

Services, and Employee Insurance Consultants, not to interfere with the NCUA's exercise of its duties as conservator of the credit union. The Binghams were ordered to immediately cease and desist from entering the credit union premises without the written permission of the NCUA. The Binghams and their companies were also ordered to continue to provide adequate space for the credit union under the lease agreement and to provide data processing services under the data processing contract. The order notified the Binghams that a hearing would be held to determine whether a permanent cease and desist order should be issued.

On December 26, 1989, J. Gordon Bingham filed a petition to show cause in the district court challenging the order of conservatorship.[1] On the same date, Bingham, his wife, and their three companies filed a petition to show cause challenging the consolidated notice of charges and hearing and temporary cease and desist order. A hearing was scheduled for January 5, 1990, but it was continued to January 17, 1990, at the request of the NCUA. On January 16, 1990, the NCUA filed in the district court a notice of filing of notice of dismissal of temporary cease and desist order and notice of charges and hearing, stating that the temporary cease and desist order had been dismissed by the NCUA.

At the hearing on January 17, 1990, the NCUA asserted that its notice of dismissal mooted the petition challenging the temporary cease and desist order. Counsel for petitioners conceded in response to questioning by the district judge that the case was moot with regard to the temporary cease and desist order. Accordingly, no evidence was presented on that issue at the hearing, and the district court did not rule on the merits of the petition challenging the temporary cease and desist order. On January 31, 1990, the district court entered an order

[1]On January 31, 1990, the district court granted Bingham's motion to amend the complaint to add First Central Credit Union as a plaintiff.

dismissing the challenge to the temporary cease and desist order holding that it was moot.

Following a two-day evidentiary hearing on the challenge to the conservatorship on January 17-18, 1990, the district court held that the NCUA's decision to place the credit union into conservatorship was not arbitrary and capricious. The district court stated that the record indicated the NCUA had ample reason under the federal statute to impose the conservatorship. On January 31, 1990, the district court entered an order dismissing the challenge to the conservatorship. The Binghams and their companies timely filed the present appeals, and this court consolidated these appeals.

The principal issues on appeal are: (1) whether the district court erred by dismissing the petition challenging the temporary cease and desist order as moot, and (2) whether the district court erred by dismissing the petition challenging the conservatorship.

II.

A. Temporary Cease and Desist Order

Petitioners argue that the NCUA's unilateral dismissal of the temporary cease and desist order did not render this action moot because they did not consent to the dismissal. Although petitioners did not consent to the NCUA's dismissal of the temporary cease and desist order, petitioners' counsel did concede in response to questioning by the district judge at the hearing that the effect of the dismissal was to render the action moot. *See* J.A. at 106. The petition challenging the temporary cease and desist order requested that the order be set aside. Thus, when the NCUA dismissed the temporary cease and desist order prior to the hearing, the petition became moot because petitioners received the relief they requested. *See International Union v. Dana Corp.*, 697 F.2d 718, 720 (6th Cir. 1983) (en banc). Moreover, we note that this is not the type of case to which the "capable-of-repetition,

yet evading review" exception to mootness is applicable. That exception applies to cases which evade review because the practice at issue is inherently short in duration even though capable of repetition. See Conyers v. Reagan, 765 F.2d 1124, 1128 (D.C. Cir. 1985) (elections, trials, pregnancies, and public school years). Because petitioners received the relief requested and conceded the mootness issue in the district court, we hold that the district court properly dismissed as moot the petition challenging the temporary cease and desist order.

B. Conservatorship

In the petition challenging the conservatorship, petitioners requested that the order of conservatorship be vacated and set aside and that the NCUA be required to show cause why it should not be enjoined from continuing possession and control of the credit union.[2] At the conclusion of the hearing on the petition, the district judge orally ruled that the NCUA's imposition of the conservatorship was not arbitrary and capricious and that "the procedure was carried out in precisely the manner the statute provided." J.A. at 276. The district judge also made the following findings of fact: "The credit union is losing money, it has suffered operating losses, it had operating problems, there's a serious problem in the contracting procedure and possible conflicts of interest. . . ." J.A. at 275-76.

On January 31, 1990, the district court entered an order incorporating the oral findings of fact and conclusions of law stated at the hearing. The district court indicated that the standard of review under the Federal Credit Union Act is restricted to determining whether the actions taken by the NCUA were arbitrary and capricious. The district court stated:

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[2]The NCUA asserts that petitioners' challenge to the conservatorship has been rendered moot because the credit union has been liquidated by the State of Tennessee, and purchased and assumed by another credit union. However, this was not in the record before the district court, and it is not properly before this court.

> The administrative record and the testimony and exhibits introduced at the hearing of this matter demonstrate that the Administration had a reasonable basis for its determination that a conservatorship was necessary under the standards of 12 U.S.C. §1786(h)(1)(A). Further, the proof and exhibits put forth by the plaintiffs failed to demonstrate that the actions of the Administration were arbitrary and capricious.

J.A. at 74.

Petitioners assert that the standard of review is broader than that employed by the district court, but they do not indicate what the standard should be, and they do not cite any authority for a different standard. Independent research has revealed no case stating the standard for reviewing the NCUA's *ex parte* appointment of itself as conservator under section 1786(h)(1).

In the absence of explicit authority on this issue, we employ the standard used by the Fifth and Eleventh Circuits to review a decision of the Federal Home Loan Bank Board (FHLBB) to appoint a receiver or conservator. *See Alliance Federal Savings and Loan v. FHLBB*, 782 F.2d 490, 493 (5th Cir. 1986); *Biscayne Federal Savings and Loan v. FHLBB*, 720 F.2d 1499, 1503 (11th Cir. 1983), cert. denied, 467 U.S. 1215 (1984). These cases hold that the sole inquiry on judicial review is whether a statutory ground existed for the FHLBB's appointment of a conservator or a receiver.

Section 1786(h)(1) specifies four circumstances in which the NCUA Board may, *ex parte* without notice, appoint itself as conservator of an insured credit union:[3]

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[3]Petitioners assert that they were denied due process by imposition of the conservatorship prior to a hearing. We dispose of this argument on the basis of the Supreme Court's ruling in *Fahey v. Mallonee*, 332 U.S. 245, 67 S. Ct. 1552 (1947), which upheld a pre-hearing seizure

> (A) the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the Fund or the interests of the members of such insured credit union;
>
> (B) an insured credit union, by a resolution of its board of directors, consents to such an action by the Board;
>
> (C) there is a willful violation of a cease-and-desist order which has become final; or
>
> (D) there is concealment of books, papers, records, or assets of the credit union or refusal to submit books, papers, records, or affairs of the credit union for inspection to any examiner or to any lawful agent of the Board.

12 U.S.C. §1786(h)(1).

At the conclusion of the hearing, the district court found that the credit union was losing money, had suffered operating losses, had operating problems, had serious problems with its contracting procedure, and a possible conflict of interest. The district court's findings are supported by the testimony of James Richardson and Ben Mauldin regarding the rapidly deteriorating financial condition of the credit union. The district court concluded that the record indicated that the NCUA had ample reason under the statute to impose the conservatorship.

Petitioners do not challenge the district court's findings regarding the financial condition of the credit union. The district court's findings support the NCUA's imposition of the conservatorship pursuant to section 1786 (h)(1)(A) to conserve the assets of the credit union, to protect the share insurance fund, and to protect the interests of the credit union members. Based on these undisputed findings, we hold that a statutory ground existed for the NCUA to

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of bank assets by a conservator appointed by the Federal Home Loan

impose the conservatorship pursuant to section 1786(h)(1)(A).[4]

III.

For the reasons stated, we AFFIRM the district court's judgments and orders of dismissal in both cases.

Administration.

[4]We dispose of other arguments by petitioners as being meritless or raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976).

UNITED STATES OF AMERICA
NATIONAL CREDIT UNION ADMINISTRATION
NATIONAL CREDIT UNION ADMINISTRATION BOARD

IN THE MATTER OF
THE CEASE AND DESIST OF;
Mr. J. Gordon Bingham, Jr.
Mrs. Brenda H. Bingham #891202-III
First Central Data Services
First Central Financial Services
Employee Insurance Consultants

CONSOLIDATED NOTICE OF CHARGES AND HEARING
TEMPORARY CEASE AND DESIST ORDER

Pursuant to Section 206(e)(1) of the Federal Credit Union Act (12 U.S.C. Section 1786-(e)(1), Mr. J. Gordon Bingham, Jr., Mrs. Brenda H. Bingham, First Central Data Services, First Central Financial Services, Employee Insurance Consulatants (hereinafter "Respondents") are hereby notified that a hearing will be held to determine whether, based on the allegations set forth below, a cease and desist order should be issued requiring them to permanently cease and desist from the practices cited below. This hearing will be conducted in accordance with the Rules of Practice and Procedure in Part 747 of the National Credit Union Administration Rules and

Regulations (12 C.F.R. Part 747), and at such time and place set forth below.

Pending final determination after hearing and pursuant to Section 206(f)(1) of the Federal Credit Union Act 12 U.S.C. Section 1786(f)(1):

A. The Respondents are ordered to immediately cease and desist:

1. From interfering with or impeding the National Credit Union Administration Board (NCUAB) and its Agents, either directly or indirectly, in the exercise of its statutory functions and duties as conservator of First Central Credit Union of Memphis (Credit Union), and from causing, bringing about, partricipating in, counseling, or aiding or abetting, either directly or indirectly, any unsafe or unsound activity with respect to the credit union or its operations.

2. From entering the credit union premises without the written permission of the conservator or its agents, unless such entry is in connection with their duties as

landlord. In that situation, the conservator shall be notified so that arrangements may be made for NCUA personnel to be present.

B. The Respondents are immediately ordered to:

1. Continue to provide adequate space for the credit union as provided for in the lease agreement, until a determination is made by the conservator on the continuation of the lease agreement;

2. Continue to provide data processing services as provided for in the data processing contract, until a determination is made by the conservator on the continuation of the contract; and,

3. Provide all requested information both orally and/or in writing, as prescribed, in a timely manner to the NCUAB or its Agents.

This temporary order is necessary based on the determinatin that the parties in the past have put their own interests ahead of the interests of the credit union. As set forth in the charges, there is reasonable cause to

believe the Respondents are about to engage in an unsafe or unsound practice and are about to violate provisions of the Federal Credit Union Act (12 U.S.C. Sections 1551 et. seq.). If this were to occur when the credit union is being placed into conservatorship, it is likely to cause significant dissipation of assets or earnings or the credit union, or it is likely to weaken the condition of the credit union or otherwise prejudice the interest of the insured members. This order is effective immediately upon service. This order will remain in effect pending the administrative hearing provided by this Notice and until such time as the National Credit Union Administration Board (NCUAB) shall dismiss the charges specified in this Notice, unless the temporary order is stayed by a court under Section 206(f)(2) of the Federal Credit Union Act 12 U.S.C. 1786(f)(2).

Charges:

I. The NCUAB has reasonable cause to believe that the Respondents are about to engage in an

unsafe and unsound practice. Of particular concern to the UCUAB is the data processing services provided by First Central Data Services. If the Binghams were to discontinue this service, the credit union would be unable to provide necessary services to its members, and in all liklihood, would have to temporarily cease operations. Since the Binghams own the building where the credit union does business, there is a reason to believe they could attempt to deny access to the agents for the conservator or they could enter the credit union without the permission of the conservator and destroy, remove, or corrupt the books and records of the credit union.

Facts:

In June, 1987, the NCUA Regional Director advised the credit union's attorney that if the board of direcors entered into any contracts with the Binghams without his expressed approval and the expressed approval of the Commissioner of the Tennessee Department of Financial Institutions, he would

consider this to be an unsafe and unsound act and would consider taking administrative action. The credit union and the Binghams ignored this warning and in December, 1988, the board of directors entered into four contracts with companies owned by the Binghams. These contracts were for:

A. The management of the credit union;

B. The exclusive right of the Binghams' insurance company to market insurance services to the credit union's field of membership and for the exclusive right to have deductions made directly to the members' share accounts for the payment of insurance premiums;

C. The provision of data processing services; and,

D. The leasing of real and personal property.

As anticipated by the Regional Director when he issued his warning, the credit union is now experiencing severe financial problems. These problems arise from the inability or

unwillingness of management to effectively control the affaairs of the credit union. In addition, the contracts between the treasurer and the credit union have contributed to high operating expenses, large operating losses, and the erosion of equity. These contracts have also provided material benefit to Mr. and Mrs. Bingham at the expense of the credit union and its membership.

The Binghams' actions are self serving in nature. Their actions have put the National Credit Union Share Insurance Fund (NCUSIF) into jeopardy. The Binghams' have been given several opportunities to reduce their control and the price of the contracts to assist the credit union's financial position. They continually refuse to make substantial changes to the contracts. Based on the Binghams' unwillingness to cooperate in the past and their virtual control over every area of the credit union's operation, it is likely that they will put their own interest ahead of the credit union by engaging in unsafe and unsound

practices.

II. The NCUAB has reasonable cause to believe that Respondents are about to violate provisions of the Federal Credit Union Act, including 12 U.S.C. 1786(h) and 1787(b)(2)(B), which provide that the NCUAB may, ex parte and without notice, take over the assets of and operate the credit union with all the powers of the members, the directors, and the officers of the credit union; conduct all business of the credit union; perform all functions of the credit union in the name of the credit union; and preserve and conserve the assets and property of the credit union. As stated in Charge I, the Respondents have control of the credit union's data processing equipment, as well as its building. This situation coupled with their previous actions gives the NCUAB reasonable cause to believe they may interfere with the lawful activities of the conservator.

Facts:

On December 14, 1989, the NCUAB placed First

Central Credit Union into Conservatorship. The conservator under 12 U.S.C. 1786(h)(8) and 1787(b)(2)(B) has the power to, ex parte and without notice, take over the assets of and operate the credit union with all the powers of the members, the directors, and the officers of the credit union; conduct all business of the credit union; perform all functions of the credit union in the name of the credit union; and preserve and conserve the assets and property of the credit union. Based on the facts as previously alleged, it is anticipated that the parties may interfere with the NCUA's lawful exercise of these statutory powers.

Notice of Hearing:

Based on the foregoing, a hearing shall be held to determine whether an order to cease and desist from the practices set forth should be issued to the Respondents. This hearing shall be conducted in accordance with the provisions of the Federal Credit Union Act 12 U.S.C. Section 1751, et seq., and Part 747 of the

National Credit Union Administration Rules and Regulations 12 C.F.R. 747.01 et seq., and will take place at a time and place to be set, for which timely notice will be given.

In accordance with the Provisions of 12 C.F.R. 747.104, the Respondents are hereby directed to file an answer to the charges contained herein, such answer to be filed with this Agency within 20 days of service of this Notice. The answer, as provided for in 12 C.F.R. 747.104, must specifically admit, deny, or state that the Respondents do not have suffsicient information to admit or to deny each allegation contained herein. A statement of lack of information shall have the effect of denial. Any allegation not denied shall be deemed admitted. If Respondents intend to deny only a part of an allegation, they shall specify so much of it is true and shall deny only the remainder.

If the Respondents do not contest any of the allegations set forth herein, their answer shall consist of statements that they admit

all the allegations to be true. Such an answer shall constitute a waiver of hearing as to the facts alleged in the Notice, as provided in 12 C.F.R. 747.104. As provided in 12 C.F.R. 747.104(d), failure to file an answer shall be deemed a waiver of the right to appear and contest the allegations herein, and authorization to the National Credit Union Administration Board to find the facts to be as alleged and to issue an appropriate order.

In accordance with the provision of 12 C.F.R. 747.102, it is hereby directed that the Respondent parties or their representataives file a written notice of appearance in this matter with the National Credit Union Administration Board. If the representatives are not attorneys, they must file with the National Credit Union Administration Board a power of attorney indicating their authority to act as the respondents' representative(s) before commencement of the hearing.

As provided in Section 206(f)(2) of the Federal Credit Union Act 12 U.S.C. Section

1786(f)(2), you may within 10 days after service of this temporary order, apply to the U.S. District Court for the judicial district in which your home office is located, or the U.S. District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending enforcement, operation or effectiveness of this temporary order, pending the completion of the administrative proceeedings pursuant to this order.

Pursuant to 12 U.S.C. 1786 (k)(2)(A),(B),-(C) and (D), and notwithstanding the foregoing statutory right of challenge, failure by any Respondent to immediately comply with the terms of this temporary order, or of any final order issued by the Board pursuant to these proceedings, may result in civil money penalties of up to $1,000,000 per day.

Dated this 14th day of December, 1989.

National Credit Union
Administration Board by

s/ John S. Ruffin
Regional Director
Region III, Atlanta

This is to certify that on the 15 of December, 1989 I personally served a copy of the foregoing order upon

First Central Financial Service

s/ Michael D. Benedetto

s/ Agent for the Conservator

NATIONAL CREDIT UNION ADMINISTRATION
REGION III

UNITED STATES OF AMERICA
NATIONAL CREDIT UNION ADMINISTRATION
NATIONAL CREDIT UNION ADMINISTRATION BOARD

IN THE MATTER OF THE
CONSERVATORSHIP OF FIRST #891201-III
CENTRAL CREDIT UNION

ORDER OF CONSERVATORSHIP

To the Board of Directors and Other Officials
of First Central Credit Union of Memphis
Certificate Number #64278

ORDER

Notice is hereby given with the written concurrence of the Tennessee Department of Financial Institutions (TDFI) that, pursuant to Section 206(h)(1) of the Federal Credit Act, 12 U.S.C. Sec. 1786(h)(1), the National Credit Union Administratin Board, (NCUA Board), has appointed itself as Conservator of First Central Credit Union of Memphis (the Credit Union) for reasons specified below. By such appointment the Conservator is exercising its authority to immediately take possession and control of the business and assets of the Credit Union.

The Board of directors of the Credit Union, and any of its officers, employees, or agents are hereby ordered to turn over and release all books, records, accounts, documents, assets, and property, both real and personal, of every description of the Credit Union to John S. Ruffin, who by this Order of Conservatorship and accompanying letter of appointment is designated as Agent for the Conservator, or to any agent appointed by the Agent for the Conservatorship including but not limited to Bradley L. Sanders, Gary F. Gaines, James Q. Richardson, Michael J. DiBenedetto, and Ben G. Mauldin.

This order is effective upon service, and the Conservator is immediately vested with all the powers of the members, the directors, the officers and the committees of the Credit Union. The board of directors is further ordered to cease all activity on behalf of the Credit Union immediately upon service of this Order and is further informed that any business purportedly conducted on behalf of

the Credit Union may subject such officials to civil and/or criminal liability.

The NCUA Board has determined that such action is necessary in order to conserve the assets of the Credit Union and to protect the National Credit Union Share Insurance Fund (NCUSIF) and the interests of the members of the Credit Union because of the unsafe and unsound practices, lack of effective Credit Union Board control and probable impairment of the Credit Union. It is critical that these problems be resolved immediately and that steps be taken to limit the potentially serious risk to the Credit Union's assets, the interest of its members and the NCUSIF.

BACKGROUND

The Credit Union was chartered on October 25, 1977 and serves employee groups over a wide geographic area of Western Tennessee. The Credit Union offers the basic services of shares, share drafts, club accounts, share certificates, and various consumer loans. In addition, the Credit Union offers real estate

loans on a limited basis. As of December 31, 1983, the Credit Union was serving over 200 different employee groups, had 5,554 members and had assets of approximately $1.6 million. Currently, the Credit Union serves approximately 600 companies, has 16,771 members and has reached $6.7 million in assets.

In April 1981, the board of directors signed an agreement with Bingham Enterprises to manage the credit union and maintain the necessary records. Bingham Enterprises is a proprietorship of Mr. J. Gordon Bingham, Jr., who is the treasurer of First Central Credit Union of Memphis. Under this contract, Bingham Enterprises would receive 29.5 percent of the credit union's gross income. In addition, the contracts gave exclusive rights to Mr. Bingham through Bingham Enterprises to market any insurance product that might be advantageous to the credit union members. In December 1982, the contract was extended through December 31, 1989, and in March 1983 the board of directors increased the percent-

age of gross income payable to Bingham Enterprises under the contract to 40 percent of gross income. In December 1988, the board of directors signed new contracts which superseded those signed in December 1982. These new contracts eliminated the provision to pay Bingham Enterprises 40 percent of gross income and replaced this provision with specific compensation requirements. In addition, these new contracts required the credit union to begin absorbing operating expenses which Bingham Enterprises had previously covered through its contractual fee of 40 percent of gross income.

Since the beginning of the relationship with Mr. Bingham,, the credit union's involvement with the various insurance products contined to increase significantly.

Due to the actions of management and the board of directors, the Credit Union is experiencing unacceptable levels of loan losses, excessive operating expenses, material and damaging operating losses, and an

erosion of equity.

NATIONAL CREDIT UNION ADMINISTRATION INVOLVMENT

The National Credit Union Administration (NCUA) first became involved with the Credit Union when an insurance review was conducted with an effective date March 31, 1984. This review was conducted as a result of concerns over the relatively high level of delinquent loans and loan losses and over the provisions of the management contract between the Credit Union and Bingham Enterprises.

Since that time, NCUA has been heavily involved in the on-site supervision of the Credit Union. This continuing supervision was considered necessary due to the Credit Union's weak financil condition, the concerns over various contract provisions and the degree of risk which the Credit Union presented to the NCUSIF. The most recent insurance review was completed on April 14, 1989 and culminated in the issuance of a Letter of Understanding and Agreement which was

signed by the officials on July 27, 1989. Several on-site, follow-up supervision contacts have been made since that time in order to monitor the progresss of the credit union in overcoming its financial and operating deficiencies and to determine the degree of compliance with the Letter of Understanding and Agreement.

The most recent insurance review and the subsequent supervision contacts revealed problems of such significance that they pose an immediate and real threat to the viability of the Credit Union as well as a risk to the NCUSIF. As of October 31, 1989, the problems listed below existed.

I. EXCESSIVE LOAN LOSSES

The board of directors and management have failed to properly control lending and collection policies and programs. As a result, the credit union has suffered significant losses from uncollectable loans. Despite modifications which have been made to these programs, losses have continued to

escalate. During the current calendar year, the credit union has suffered net loan losses of $216,631 or 54 percent of the credit union's total capital which existed on January 1, 1989. This loss rate is approximately nine times greater than that of similar sized credit unions. The current loan portfolio still contains a significant number of high risk loans which have not yet defaulted.

For the years 1984 through 1988, the credit union's ratio of net loan losses was consistently greater than that of its peer credit unions. The credit union's average loss ratio for the period was more than 300 percent greater than that of its peers. Despite this poor performance history, the management of the credit union failed to evaluate the problem and correct the deleterious deficiencies.

It is projected that continued loan losses at the levels experienced during 1989 will deplete reserves within the next four to six months.

II. PROFITABILITY

Management and the board of directors have failed to provide adequate budgetary contraol over the operations of the credit union which has resulted in material and unacceptable levels of net operating losses.

Though the financial statements indicated that the credit union had maintained a positive net earnings position through December 1988, profitability had, in fact, been propped up through the issuance of extremely high risk loans. Once these high risk loans began to surface and become non-producing assets a more true reflection of the credit union's profitability position began to emerge. In addition, as a result of the new contracts entered into in December 1988 between the credit union and the various companies owned by Mr. and Mrs. Bingham the operating expenses of the credit union dramatically increased. During the first 10 months of 1989, the credit union experienced an annualized net loss equal to 4.78 percent of

average assets. These losses are directly attributable to the unacceptable level of loan losses, the lack of budgetary control, and excessive levels of operating expenses.

The previous contract under which the Bingham's managed the credit union's operations called for the credit union to pay to Bingham Enterprises 40 percent of gross income, from which Bingham Enterprises would pay the majority of the credit union's operating expenses. Under this contract, the credit union's operating expenses as a percentage of gross income equalled 46.9, 46.9 and 51.6 percent for the years 1986, 1987 and 1988, respectively. On an average, this equates to an operating expense to gross income ratio which was 39 percent above that of the credit union's peers. The contracts entered into in December 1988 required the credit union to provide specific compensation for the services being rendered by the various companies owned by the Binghams plus absorb the other operating expenses previously

covered by Bingham Enterprises. As a result, operating expenses increased. For the current year to date the credit union's ratio of operating expenses to gross income equals approximately 75 percent which is 114 percent higher than that of its peer group. For the month of October 1989 this ratio equalled approximately 85 percent.

Budgets prepared during early 1989 were unrealistic and unsupportable. In August 1989, management presented a budget for the months of July 1989 through June 1990 which indicated that the credit union would rech a sustained positive net earnings position in 1990. In October 1989 management and board of directors presented a revised budget for the months of January through December 1990 which projected a net gain of $105,090 for the year ending December 31, 1990. However, the credit union has fallen short of its projected net earnings position for the months of September and October 1989. For the month of September the budget projected $95,497 in gross income

and a net operating loss of $6,958. Actual results of operations for that month was $89,419 in gross income and a net operating loss of $23,522. October's budget called for gross income of $81,778 and a net operating loss of $20,936, but the credit union actually realized only $72,187 in gross income and suffered a net operating loss of $103,839.

The method in which management has attempted and continues to attempt to increase and improve profitability is to raise the fees charged to the members. For the years of 1987 and 1988, fee income equalled 2.2 and 2.4 percent of average assets, respectively, and also equalled approximately 17 percent of gross income. Through October 1989, fee income has increased roughly 60 percent and now equals approximately 23 percent of gross income and 3.5 percent of average assets. As a point of comparison, the average ratio of fee income to gross income of similar size Federally-insured State-chartered credit unions was only four percent through June 30,

1989. The credit union's 1990 operating budget projects an additional 35 percent increase in fees and charges while, at the same time, operating expenses are budgeted to remain relatively constant.

The negative and material impact from the new contracts on the profitability of the credit union, the high and escalating levels of fee income, plus the failure of management to reduce and control operating expenses indicate that the budgetary process is geared toward benefiting the Binghams at the expense of the members.

III. CAPITAL EROSION

Management and the board of directors has failed to preserve the equity of the credit union.

As of October 31, 1989, the credit union has a total of $118,385 in the Regular Reserves and Undivided Earnings accounts, representing a $228,988 or 64 percent decrease in these accounts since January 1, 1989. During that same period of time, the Undivided Earnings

account has decreased from $69,920 to a deficit balance (taking current net income and Tennessee reserving requirements into consideration). As of October 31, 1989 the credit union's Net Capital to Assets ratio equals less than two percent.

As a result of this erosion of capital, the credit union may be unable to legally meet its current divident levels in December 1989. It is also projected that at the current rate of decline the credit union will deplete its Regular Reserves and Undivided Earnings accounts within the next four to six months and become insolvent. This erosion of capital represents a material and unacceptable level of risk to the NCUSIF.

IV. UNSAFE AND UNSOUND CONTRACTS

The board of directors have entered into various contracts with companies owned by Mr. Bingham and his wife. These contracts are considerred to be unreasonable and profit the treasurer to the detriment of the credit union. The contracts have contributed to the

continued losses being experienced by the credit union, are burdensome and materially threaten the NCUSIF.

In his June 25, 1987 response to a letter from the credit union's attorney, the Regional Director stated that if the board of directors entered into any contracts with the Binghams without his expressed approval and the expressed approval of the Commissioner of the Tennessee Department of Financial Institutions, he would consider that to be an unsafe and unsound act and would consider taking administrative action; however, in December 1988, the board of directors entered into four separate contracts with companies owned by Mr. Bingham. These contracts were for:

A. The management of the credit union.

B. The exclusive right of the Binghams' insurance company to market insurance services to the credit unions' and for the exclusive right to have deductions made directly from the members' share accounts for the payment of insurance premiums;

C. The provision of data processing services; and

D. The leasing of real and personal property.

The first three contracts each have maturity terms of seven years and the contract for the leasing of real and personal property has a fifteen-year term. Each contract contains a successor clause making the contracts binding on any future merger partner. In addition, the contracts for the leasing of the real property and for the data processing services are in violation of Chapter 0180-9-1-.02 of Tennessee's Department of Financial Institutions' Rules.

These contracts materially affected the operations of the credit union. For the year ending December 31, 1988, operating expenses equalled 51.6 percent of gross income, a high level in and of itself; however, the additinal costs directly related to the new contracts plus the absorption of additional expenses as required by these contracts increased the

level of operating expenses to 75 percent of gross income for the current year to date. Of the total operating expenses incurred through October 1989, 40 percent can be directly traced to payments or liabilities to companies owned by Mr. Bingham.

The budgets were entered into without reasonable budgetary analysis by the board of directors, and, even more significantly, the board of directors has obligated the credit union to contracts which give extensive control to Mr. Bingham over several areas of operation and for extended periods of time.

V. FAILURE TO COMPLY WITH THE LETTER OF UNDERSTANDING AND AGREEMENT

On July 27, 1989, management and the board of directors entered into a Letter of Understanding and Agreement between the credit union's officials, TDFI and NCUA in which they agree, among other things, to:

A. Achieve and maintain a net capital to asset ratio equal to at least 4.0 percent;

B. Achieve and maintain a net income

position equal to 0.20 percent of average assets;

C. Maintain the Allowance for Loan Losses account at an amount equal to the greater of the total of loans determined to be doubtful or loss through an individual classification or through the State's requirement of 25 percent of loans delinquent two to six months delinquent and 75 percent of loans delinquent six to twelve months delinquent; and

Management and the board of directors have failed to make progress toward meeting these major provisions of the outstanding Letter of Understanding and Agreement. Net capital has declined to 1.8 percent of assets as of October 31, 1989, net income from operations equals a net loss of 4.78 percent of assets, and the board of directors has failed to properly maintain the allowance for loan losses account. Only after specific direction from NCUA during the October NCUA supervision contact did the board of directors

charge off $60,000 in bad debts and increase the Allowance for Loan Losses account by more than $90,000 in order to meet full and fair disclosure requirements.

The failure of management and the board of directors to make progress toward meeting these provisions of the Letter of Understanding and Agreement indicates an unwillingness or inability to properly direct and control the operations of the credit union thereby creating an unacceptable degree of risk for the NCUSIF.

SUMMARY

The credit union has been operated in an unsafe and unsound manner and is experiencing severe operating and financial problems which threaten its continued existence. These problems arise from the inability or unwillingness of management to effectively control the affairs of the credit union. In addition, the contracts between the treasurer and the credit union have contributed to the high operating expenses, the high operating losses

and the erosion of equity. These contracts have also provided material benefit to Mr. Bingham at the expense of the credit union and its membership. If current trends continue, it is anticipated that the credit union will be insolvent within the next 12 months.

Due to the actions of management and the credit union's current financial and operating condition, this credit union is considered to be, in essence, a money making scheme for the Bingham's, and the NCUSIF is being materially threatened by the unacceptably high level of loan losses, the lack of budgetary control, the significant operating losses, and the actions of the treasurer.

In order to conserve the assets of the credit union and protect both the interest of the NCUSIF and the members of the credit union. it is necessary for the NCUA Board to place First Central Credit Union of Memphis into conservatorship and appoint itself as Conservator. In accordance with the Agency's responsibilities under the Federal Credit

Union Act, this conservatorship action is being taken to provide sufficient opportunity for the Agency to maintain control of the credit union until such time as it is assured that the present and potential problems have been, or will soon be corrected and any risks to interested parties have been overcome or substantially reduced.

ORDER OF NONPUBLICATION

Due to the fact that the Credit Union will remain in operation during the Conservatorship imposed hereby and the nature of the charges contained herein could, if made public, cause damage to the Credit Union or otherwise hinder the ability of the Conservator to maintain normal operations and to protect the assets of the Credit Union, interest of the members, the NCUSIF, and other individuals involved, it is hereby ORDERED that this Order of Conservatorship and any of its contents shall not be disclosed or otherwise made public except to the extent authorized or deemed appropriate by the Conservator of the Agent or Subagents for

the Conservator.

NOTICE

No later than ten days after the date this Order is delivered, the board of directors may, pursuant to an appropriate board of directors's resolution, apply to the United States District Court for the judicial district in which the principal office of the Credit Union is located, or the United States District Court of the District of Columbia, for an order requiring the NCUA Board to show cause why it should not be enjoined from continuing possession and control of the Credit Union. Costs and expenses of such a challenge, including attorneys' fees, may only be paid out of credit union's assets if the board of directors prevails on the merits.

Dated this 14th day of Dec. 1989.

NATIONAL CREDIT UNION
ADMINISTRATION BOARD

s/ By John S. Ruffin
JOHN S. RUFFIN
Regional Director

CERTIFICATE OF SERVICE

This is to certify that on behalf of the First Central Credit Union of Memphis, I have received the Order of Conservatorship dated _____, 19 __.

_____ _____
Date Signature

_____
Title

I hereby certify that the foregoing Order of Conservatorship was served on First Central Credit Union of Memphis by personal delivery to:

_____

_____ _____
Date Signature

_____
Title

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Stamped filed
4:30 p.m.,
Jan. 16, 1990)

J. GORDON BINGHAM, JR.
Plaintiff,

vs. No. 89-3138-HB

NATIONAL CREDIT UNION
ADMINISTRATION BOARD,
Defendant

NOTICE OF FILING OF NOTICE OF DISMISSAL
OF TEMPORARY CEASE AND DESIST ORDER
AND NOTICE OF CHARGES AND HEARING

The undersigned Assistant United States Attorney hereby gives notice that the National Credit Union Administration Board has issued a Notice of Dismissal of Temporary Cease and Desist Order and Notice of Charges and Hearing, which is hereby being filed with this court. The notice is attached hereto.

Respectfully submitted,

W HICKMAN EWING, JR.
s/ By Joe A. Dycus
JOE A. DYCUS
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I, Joe A. Dycus, Assistant United States Attorney for the Western District of Tennessee, hereby certify that a copy of the foregoing Notice has been mailed, first class postage pre-paid, to plaintiff's attorney of record, Albert H. Boyd, Esquire, 424 N. McNeil, Memphis, Tennessee 38112.

This 16th day of January, 1989.

s/ Joe A. Dycus
JOE A. DYCUS
Assistant U.S. Attorney

NATIONAL CREDIT UNION ADMINISTRATION

REGION III

UNITED STATES OF AMERICA
NATIONAL CREDIT UNION ADMINISTRATION
NATIONAL CREDIT UNION ADMINISTRATION BOARD

IN THE MATTER OF
THE CEASE AND DESIST OF:
Mr. J. Gordon Bingham, Jr.
Mrs. Brenda H. Bingham #891202-III
First Central Data Services
First Central Financial Services
Employee Insurance Consultants

NOTICE OF DISMISSAL OF TEMPORARY CEASE AND DESIST ORDER AND NOTICE OF CHARGES AND HEARING

Pursuant to Sections 206(e)(2) and (f)(1) of the Federal Credit Union Act (12 U.S.C. Sections 1786 (e)(2) and (f)(1)) J. Gordon Bingham, Jr., Brenda H. Bingham, First Central Data Services, First Central Financial Services, and Employee Insurance Consultants are hereby notified that Charges in the Consolidated Notice of Charges and Hearing and the Temporary Cease and Desist Order have been dismissed by the National Credit Union Administration Board.

The Board has determined that based on present conditions, the Cease and Desist Orders are no

longer necessary.

Dated this 16th day of January, 1990.

National Credit Union
Administration Board by

s/ John S. Ruffin
Regional Director
Region III, Atlanta

7000 Central Parkway Suite 1600
Atlanta, Georgia 404--396--4042

PART 747

Administrative Actions,
Adjudicative Hearings, and
Rules of Practice and Procedure

Section 747.01 Scope.

(a) This Part describes the various administrative adjudicative actions available to the National Credit Union Administration Board, the grounds for those actions and the procedures used in hearings related to each available action. The administrative actions described herein, as well as the grounds and hearing procedures for each, are controlled by Sections 120(b) (except where the Federal credit union is closed due to insolvency), 206 and 304(c)(3) of the Federal Credit Union Act. Should any provision of this Part be inconsistent with these, or any other provisions of said Act, as amended, the Act shall control. Judicial enforcement of any action or order described in this Part, as well

as judicial review thereof, shall be as prescribed under the Federal Credit Union Act (12 U.S.C. Sec. 1751 et seq.) (hereinafter Act) and the Administrative Procedure Act (5 U.S.C. Sec. 500 et seq.)

(b) As used in this Part, the term insured credit union means any Federal credit union or any state chartered credit union insured under Subdchapter II of the Act unless the context indicates otherwise.

5 U.S.C. SEC. 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this

rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

* * *

Definition of "and." "It expresses a general relation or connection, a participation or accompaniment in sequence, having no inherent meaning standing alone but deriving force from what comes before and after. In its conjunctive sense the word is used to conjoin words, clauses, or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which proceeds and its use implies that the connected elements must be grammatically co-ordinate, as where the elements preceding and succeeding the use of the words refer to the same subject matter. While it is said that there is no exact synonym of the word in English, it has been defined to mean "along with," "also," "and also," "as well as," "besides," "together with."[1] (Citation omitted.)

Definition of "or." "A disjunctive particle used to express an alternative or to give a choice of one among two or more things....

"Or is frequently misused; and courts will construe it to mean "and" where it was so used."[2] (Citations omitted.)

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[1]Henry Cambell Black, **Black's Law Dictionary,** 4th ed., (St. Paul MN: West Publishing Co., 1951), p. 112.

[2]**Ibid.**, p. 1246.

12 U.S.C. SEC. 1464(d)(6)(A):

The grounds for the appointment of a conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial disipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as

herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

12 U.S.C. SEC. 1786(e)(1)(2):

(e) Opinion of Board as to unsound condition of credit union; notice of charges; hearing; order to cease and desist; judicial review.

(1) If, in the opinion of the Board, any insured credit union, credit union which has insured accounts, or any institution-affiliated party is engaging or has engaged, or the Board has reasonable cause to believe that the credit union or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such credit union, or is violating or has violated, or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the Board in connection with the granting or any application or other request by the credit union or any written agreement entered into with the Board, the Board may issue and serve upon the credit union or such party a notice of charges in respect thereof. The notice shall contain a statement of the

facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the credit union or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the Board at the request or any party so served. Unless the party or parties so served shall appear at the hearing by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease and desist order. In the event or such consent, or if upon the record made at any such hearing, the Board shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the Board may issue and serve upon the credit union or the institution-affiliated party an order to cease

and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the credit union or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the credit union or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the Board or a reviewing court.

12 U.S.C. SEC. 1786(f)(1):

(f) Temporary cease and desist order; injunctive procedure

(1) Whenever the Board shall determine that the violation or threatened violation or the unsafe or unsound practices, specified in the notice of charges served upon the credit union or any institution-affiliated party pursuant to paragraph (1) of subsection (e) of this section, or the continuation thereof, is likely to cause insolvency or substantial dissipation of assets or earnings of the credit union, or is likely to seriously weaken the condition of the credit union or otherwise seriously prejudice the interests of its insured members prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (e) of this section, the Board may issue a temporary order requiring the credit union or party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending

completion of such proceedings. Such order may include any requirement authorized under subsection (e)(3)(B) of this section. Such order shall becaome effective upon service upon the credit union or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the Administration shall dismiss the charges specified in such notice, or if a cease and desist order is issued against the credit union or such party, until the effective date of such order.

12 U.S.C. SEC. 1786(h)(1):

(h) Board's self-appointment as conservator; consultation with State; authority

(1) The Board may, ex parte without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union in any case in which--

(A) The Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the fund or the interests of the members of such insured credit union;

(B) An insured credit union, by a resolution of its board of directors, consents to such an action by the Board;

(C) There is a willful violation of a cease-and-desist order which has become final; or

(D) There is concealment of books, papers, records, or assets of the credit union or refusal to submit books, papers, records, or affairs of the credit union for inspection

to any examiner or to any lawful agent of the Board.

(2) (A) In the case of a State-chartered insured credit union, the authority conferred by paragraph (1) shall not be exercised without the written approval of the State official having jurisdiction over the State-chartered credit union that the grounds specified for such exercise exist.

(B) If such approval has not been received by the Board within 30 days of receipt of notice by the State that the Board has determined such grounds exist, and the Board has responded in writing to the States's written reasons, if any, for withholding approval, then the Board may proceed without State approval only by a unanimous vote of the Board.

12 U.S.C. SEC. 1787(c)(1)(A)(B)(C):

(c) Provisions relating to contracts entered into before appointment of conservator or liquidating agent

(1) Authority to repudiate contracts

In addition to any other rights a conservator or liquidating agent may have, the conservator or liquidating agent for any insured credit union may disaffirm or repudiate any contract or lease--

(A) to which such credit union is a party;

(B) the performance of which the conservator or liquidating agent, in the conservator's or liquidating agent's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or liquidating agent determines, in the conservator's or liquidating agent's discretion, will promote the orderly administration of the credit union's affairs.

Certificate of Service

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon Mrs. Mary Rupp, Staff Attorney, National Credit Union Administration, 1776 G Street, N.W. Washington, D.C. 20456, that three copies also have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, all via U.S. Mail, first-class postage prepaid, this 4th day of June 1991.

Albert H. Boyd

Albert H. Boyd

Attorney for Petitioners